

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL NOLAN JARVIS,

Defendant-Appellant.

UNPUBLISHED

April 16, 1999

No. 205748

Jackson Circuit Court

LC No. 97-079176 FC

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a term of fifteen to twenty-five years' imprisonment. We affirm.

Defendant was prosecuted under the definition of "sexual penetration" that proscribes "any other intrusion, however slight, of any part of a person's body . . ." MCL 750.520a(1); MSA 28.788(1)(l). He now contends that MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) is unconstitutional as applied to him because he allegedly penetrated the victim's genitals for a legitimate purpose, without sexual intent. We disagree.

As our Supreme Court observed in *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997):

CSC I requires the prosecutor to prove "sexual penetration." MCL 750.520b(1); MSA 28.788(2)(1). CSC II requires the prosecutor to prove "sexual contact." MCL 750.520c(1); MSA 28.788(3)(1). Sexual penetration can be for any purpose. MCL 750.520a(1); MSA 28.788(1)(l). The statute defines sexual contact, however, as touching that "can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(k); MSA 28.788(1)(k). Thus, [] CSC II requires proof of an intent not required by CSC I -- that defendant intended to seek sexual arousal or gratification[.]

Because the facts of this case clearly demonstrate that defendant had no authorization or valid purpose for penetrating the victim's genitals, his challenge to the statute's constitutionality by analogy to hypothetical situations unrelated to the present facts is unpersuasive, see *People v Green*, 123 Mich App 563, 565; 332 NW2d 610 (1983) as is his contention that MCL 750.520a(1); MSA 28.788(1)(1), pursuant to the principle of *ejusdem generis*, must be read to include a sexual purpose. The CSC I statute is constitutional as applied to defendant, and his conviction under it is valid. For the same reason, we find unconvincing defendant's argument that the district court abused its discretion by binding this case over to circuit court without a finding that penetration was accomplished for a sexual purpose.

Defendant next argues that he was denied the effective assistance of counsel at trial. Our review of the specific instances of alleged ineffective assistance discloses that defendant has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms or that there is a reasonable probability that, but for the alleged errors, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994); *People v Poole*, 218 Mich App 702; 717-718; 555 NW2d 485 (1996).

Defendant further contends that the trial court abused its discretion by denying his motion for a mistrial without adequately investigating whether the jury was tainted by comments allegedly made by a spectator at trial regarding defendant's guilt. We believe that the court's interrogation of the jury regarding the alleged comments was adequate to ensure that no taint occurred, and defendant was not deprived of a fair and impartial trial. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

Defendant further maintains that an enlargement of a diagram of the victim's genitals that he had drawn in the margin of a document was improperly admitted into evidence because its probative value was substantially outweighed by unfair prejudice and needless presentation of cumulative evidence. MRE 403. This issue is not preserved for appellate review because defendant did not object at trial on the grounds now argued on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994).

We find unpersuasive defendant's allegation that discrepancies in the trial transcript necessitate reversal of his convictions and sentence. He has not demonstrated that deficiencies in the transcript preclude this Court's ability to fairly adjudicate this appeal. *People v Federico*, 146 Mich App 776, 799-800; 381 NW2d 819 (1985).

Defendant next argues that various errors occurred during sentencing, thus requiring resentencing. We have reviewed the alleged errors and find nothing warranting the relief defendant seeks.

As his final allegation of error, defendant claims that his sentence is disproportionate. In view of the nature of the offense, defendant's extensive prior criminal record, and his fourth-offense habitual offender status, we find that defendant's sentence is proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald